

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

BENNIE KELLY, Warden)	CASE NO. 1:12CV2580
)	
Respondent,)	JUDGE CHRISTOPHER A. BOYKO
)	
Vs.)	
)	
WILLIAM B. O'NEAL,)	<u>ORDER</u>
)	
Petitioner.)	

CHRISTOPHER A. BOYKO, J:

This matter is before the Court on the Report and Recommendation of the Magistrate Judge that Petitioner William B. O'Neal's Motion to Withdraw his Petition under 28 U.S.C. § 2254 for Writ of Habeas Corpus be granted, in part. For the following reasons, the Court accepts and adopts the Magistrate Judge's Report and Recommendation, in part, and deems Petitioner's Motion to Withdraw his habeas Petition withdrawn. The case will proceed on Petitioner's unexhausted claims.

On October 16, 2012, Petitioner filed his Petition under 28 U.S.C. § 2254 for Writ of Habeas Corpus. The case was referred to the Magistrate Judge on October 30, 2012, for a Report and Recommendation on the Petition. On December 13, 2012, Petitioner filed a Motion Requesting Withdrawal of his Petition asking the Court to allow him to withdraw his Petition or, in the alternative, dismiss his claims without prejudice because he had not exhausted his state law remedies. On December 17, 2012, the Magistrate Judge issued her Report and Recommendation, recommending that the Court grant Petitioner's Motion if the Motion to

Withdraw was not withdrawn by January 7, 2013. The Magistrate Judge warned Petitioner that some of his claims may be subject to statute of limitations defenses if they were withdrawn.

On December 31, 2012, the Respondent filed his Objection to the Magistrate Judge's Report and Recommendation, contending that Petitioner knew his claims were not yet exhausted at the time he filed his Petition with the Court. Furthermore, the Respondent contends all Petitioner's claims are unexhausted and allowing him to withdraw his Petition would result in additional expense for Respondent.

On January 2, 2013, Petitioner withdrew his Motion to Withdraw and asked the Court to proceed on his unexhausted claims.

Having reviewed the Magistrate Judge's Report and Recommendation and Respondent's Objections, the Court agrees with the Magistrate Judge and deems withdrawn Petitioner's Request to Withdraw his Petition. Respondent's arguments that all Petitioner's claims are unexhausted are more appropriately addressed in briefs on the merits of Petitioner's Petition rather than a brief on a procedural motion. Therefore, the Court accepts and adopts the Magistrate Judge's Report and Recommendation insofar as Petitioner withdrew his Motion to Withdraw in the time set by the Magistrate Judge and finds Petitioner's Request for Withdrawal of his Petition withdrawn. The case shall proceed on the merits of Petitioner's Petition and the case is referred back to the Magistrate Judge for further proceedings.

IT IS SO ORDERED.

s/ Christopher A. Boyko
CHRISTOPHER A. BOYKO
United States District Judge

Dated: February 6, 2013